Supreme Court

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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP,
Petitioner,

v.

MAXWELL HOUSE COFFEE COMPANY,
KRAFT GENERAL FOODS, INC.,
VISTA CHEMICAL COMPANY, ENTERPLAST, INC.,
AND H. MUEHLSTEIN & CO., INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May a party who fails to file a notice of appeal benefit from a reversal upon remand of the case?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit include:

1. Petitioner, Grand Lockwood Partners Limited Partnership, appellee;
2. Maxwell House Coffee Company, appellant and appellee;
3. Kraft General Foods, Inc., appellant and appellee;
4. Vista Chemical Company, appellee only;
5. Enterplast, Inc., appellant; and
6. H. Muehlstein & Co., Inc., appellant.

Grand Lockwood Partners Limited Partnership is not a corporation, and therefore, it has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Grand Lockwood Partners Limited Partnership, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit in addition to the denial of Grand Lockwood's Petition for Panel Rehearing and Motion for Clarification of Opinion.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 115 F.3d 282 (5th Cir. 1997) and 1997 U.S. App. LEXIS 13055 (June 4, 1997) and is reproduced in the separately bound Appendix to this petition ("App.") at 1a. The unreported opinions denying Grand Lockwood's Petition for Panel Rehearing and denying Grand Lockwood's Motion for Clarification of Opinion are reproduced at App. 16a and 18a. The district court's unreported Final Judgment is reproduced at App. 20a. The district court's Memorandum Opinion and Order, the Special Master's Report and Recommendation, and the Errata Sheet Supplementing the Special Master's Report and Recommendation—all of which are unpublished and all of which are incorporated in the district court's final judgment—are reproduced at App. 23a, 32a and 81a, respectively.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion on June 4, 1997, and on July 7, 1997, denied Grand Lockwood's Petition for Panel Rehearing and Motion for Clarification of Opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent Federal Rules of Appellate Procedure at issue in this petition are Rules 3, 4(a) and 26(b), and are set forth below:

Rule 3. Appeal as of Right — How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4.... Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal....

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." ... A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for

failure to name a party whose intent to appeal is otherwise clear from the notice. . . .

. . .

(e) Payment of Fees. Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion

outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or any part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of

the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Rule 26. Computation and Extension of Time

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

STATEMENT OF THE CASE

This application arises from an interpleader action filed pursuant to 28 U.S.C. § 1335 and presents the sole issue of whether parties who fail to meet the jurisdictional notice of appeal requirements in rules 3, 4 and 26(b) of the Federal Rules of Appellate Procedure are entitled to receive the benefits of an appellate reversal upon remand. The Fifth Circuit in this case, and some other courts of appeals, continue to act in conflict with this Court's rulings in *Torres v. Oakland Scavenger Company,* 487 U.S. 312, 315-16 (1988) (holding a timely filed notice of appeal is mandatory and jurisdictional to appellate review) and *Morley Construction Company v. Maryland Casualty Company,* 300 U.S. 185, 191 (1937) (ruling that, absent a timely notice of appeal, an appellee may not attack the judgment below to enlarge his own rights or diminish his adversary's rights). These courts treat notices of appeal as rules of practice, not jurisdictional prerequisites to participate in an appeal. The facts underlying this application give the Court a timely opportunity to resolve this split of authority, not only between this Court's precedents and those of the courts of appeals, but also between and within the federal circuits.

This case presents the question of whether parties in two circumstances who fail to file a notice of appeal can benefit from the appeal: (1) parties who take no action in the appellate court; and (2) a party who tries to piggy-back itself onto another party's proper appeal by filing an appellee's brief on one issue and adopting the other party's brief on a separate issue. Litigants look to notices of appeal to determine the extent of the finality of the judgment. Through this case, this Court may promote judicial policies favoring the finality of judgment.

A. Course of Proceedings and Disposition in the District Court.

After a fire destroyed a warehouse and the goods stored within, the insurer of the warehouse and certain contents filed this interpleader action to resolve conflicting claims for insurance

proceeds. (Appellants' Record Excerpts, Tab 2, 2091.)[1] Petitioner, Grand Lockwood Partners Limited Partnership was named as a defendant because it had incurred clean-up and debris removal expenses resulting from the fire. The district court found Grand Lockwood and seven other parties entitled to recover under the insurance policy and awarded Grand Lockwood a proportionate share of the interpleaded funds. (Tab 5, 2215-14; Tab 2, 2051; Tab 6, 2371-70.) The court found that several other entities, including Enterplast, Inc. and H. Muehlstein & Co., Inc. were not entitled to any of the interpleaded funds. (Tab 5, 2215-14; Tab 2, 2056-52.) Other parties, including Maxwell House Coffee Company and Kraft General Foods, Inc. (jointly "Kraft") received less money than the amount to which they thought they were entitled.

B. Course of Proceedings and Disposition in the Appellate Court.

Kraft filed a notice of appeal in the United States Court of Appeals for the Fifth Circuit, complaining of the award to Grand Lockwood and seeking for themselves a higher award from the proportion awarded Grand Lockwood. (Tab 7, 2378-75; Brief of Appellants Maxwell House Coffee Company and Kraft General Foods, Inc. for the Account of Their Deductible Uninsured Interest.) The Kraft parties appealed only on behalf of themselves. Enterplast and Muehlstein filed cross-notices of appeal, challenging only the trial court's refusal to award them interpleaded funds and omitting any claim to the Grand Lockwood funds. (Tab 8, 2382-80; Brief of Intervenor-Defendant-Appellant Enterplast, Inc.; Tab 9, 2384-83; Brief of Intervenor Defendant-Appellant H. Muehlstein & Co., Inc.) No other party filed a notice of appeal challenging the district court's judgment for Grand Lockwood.

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[1] Grand Lockwood cites to the Record Excerpts of Appellants Enterplast, Muehlstein and Kraft, filed in the Court of Appeals for the Fifth Circuit.

Months after the filing deadline expired, Vista Chemical Company, without a notice of appeal, filed an appellee's brief arguing in support of the district court's ruling against Enterplast and Muehlstein and attempting to adopt by reference Kraft's appellate brief. (Brief of Defendant/Appellee Vista (hereinafter "Vista Brief") at 5-6.)

Ultimately, the court of appeals affirmed the judgment refusing funds to Muehlstein and Enterplast, but reversed the judgment awarding funds to Grand Lockwood. (App. 15a.) It remanded the case to the district court for a recalculation and redistribution of the interpleaded funds. (*Id.*)

Grand Lockwood filed a Petition for Panel Rehearing and Motion for Clarification of Opinion. In it, Grand Lockwood requested that the court of appeals clarify its opinion to provide that only parties who timely filed a notice of appeal are entitled to additional funds upon remand, pursuant to rules 3, 4, and 26(b) of the Federal Rules of Appellate Procedure and pursuant to *Torres v. Oakland Scavenger Company,* 487 U.S. 312 (1988). Vista, on the other hand, maintained that "all parties" to the district court's judgment "became parties to the appeal" once Kraft invoked the Fifth Circuit's jurisdiction. (See Vista Chemical Company's Reply to Grand Lockwood Partners Limited Partnership's Petition for Panel Rehearing and Motion for Clarification of Opinion at 2.) Vista argued that under the court's opinion, with the exception of Grand Lockwood, all parties who the trial court determined to be entitled to interpleaded funds should share proportionately in the funds originally awarded to Grand Lockwood. (*Id.* at 4.) On July 7, 1997, the court of appeals denied Grand Lockwood's petition and motion for clarification without opinion. (App. 17a, 19a.)

REASONS FOR GRANTING THE PETITION

Despite the plain language and history of rules 3, 4, and 26(b) of the Federal Rules of Appellate Procedure and counter to this Court's precedents, the courts of appeals remain divided on the issue of whether a timely filed notice of appeal is a jurisdictional threshold or merely a rule of practice that may be circumvented in certain circumstances. The split of authority on this issue, both among and within the circuits, is pervasive. It fosters inequity by allowing non-appealing parties to benefit, without risk, from another party's appeal. It undermines judicial economy and the plain language of the appellate rules. Most importantly, it frustrates the public policy favoring the finality of judgments.

This case presents a timely opportunity to resolve the issue of whether a party must satisfy rule 3, 4 and 26(b) requirements to benefit from an appellate reversal. To Grand Lockwood's detriment, this error of allowing Vista and other parties who did not file notices of appeal to benefit from the reversal potentially bestows windfalls to the non-appealing parties, contrary to *Torres v. Oakland Scavenger Company,* 487 U.S. 312, 315-16 (1988) (ruling a timely filed notice of appeal is mandatory and jurisdictional to appellate review). This error permits appellee Vista, without filing a notice of appeal, to impermissibly attack the judgment below, thereby enlarging its own rights and diminishing Grand Lockwood's rights, contrary to *Morley Construction Company v. Maryland Casualty Company,* 300 U.S. 185, 191 (1937).

The parties below exercised their rights as litigants during their first opportunity in court. If aggrieved, they were entitled to perfect their appeal in a timely fashion. Absent an appeal, however, they conceded to the judgment. Were it otherwise, there would be no finality of judgment.

I. The court of appeals' refusal to limit its remand exacerbated the wide split of authority among and within the circuits.

The Fifth Circuit's denial of Grand Lockwood's Petition for Panel Rehearing and Motion for Clarification of Opinion only

compounds the confusion upon existing conflicts between precedents of this Court and the courts of appeals, as well as upon conflicts among and within the federal circuits. Since 1937, this Court has consistently written that a notice of appeal is a prerequisite to attack a lower court's judgment. This proposition is implicit in the appellate rules. And yet, contrary to the rules and precedent, courts continue to extend appellate jurisdiction to parties who fail to file a notice of appeal. The Fifth Circuit's refusal to clarify its opinion relegates Grand Lockwood to the trial court to be subjected to meritless legal theories that cannot be resolved consistently with this Court's precedent and the appellate rules.

A. Embodied in the Federal Rules of Appellate Procedure, *Morley Construction Company v. Maryland Casualty Company* requires a notice of appeal to invoke appellate jurisdiction.

The requirement to file a notice of appeal in order to invoke the appellate court's jurisdiction, and thus to become entitled to appellate benefits upon remand, stems back to early 1937. It was then that this Court addressed the issue of an appellate court's power to modify a decree for the benefit of an appellee in the absence of a cross-appeal. *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 187 (1937). In the absence of a cross-appeal, the Court wrote, an appellee cannot " 'attack the decree with a view either to enlarge his own rights thereunder or of lessening the rights of his adversary.' " *Id.* (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)). The Court reasoned that a court of appeals lacks "power" (or jurisdiction) to modify the judgment in the absence of a cross-appeal, creating the "inveterate and certain" rule that a notice of appeal is jurisdictional to appellate review and benefits. *Morley*, 300 U.S. at 191.

Morley's mandate is embodied in the structural framework of the rules concerning perfection of appeal, rules 3, 4 and 26(b). FED. R. APP. P. 3, 4, 26(b). Rule 3 provides that an appeal *"must*

be taken by filing a notice of appeal" within the time specified in rule 4 and that the "failure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal." FED. R. APP. P. 3 (emphasis added). Under rule 4, an initial notice of appeal must be filed within thirty days of the judgment. FED. R. APP. P. 4(a)(1). When one party appeals in a timely fashion, rule 4 provides an additional fourteen days for other parties to file a notice of appeal. FED. R. APP. P. 4(a)(3). Rule 26(b) prohibits courts from enlarging the notice of appeal filing deadline. FED. R. APP. P. 26(b). These rules restate the proposition established in *Morley*: Absent a timely notice of appeal, a party fails to cross the appellate court's jurisdictional threshold and forever closes the doorway to attack the trial court's judgment or to benefit from an appeal. *Morley,* 300 U.S. at 191; *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315-16 (1988).

B. Courts remain divided on the issue of whether a notice of appeal is required to benefit from an appellate reversal.

This Court has consistently applied *Morley* in refusing to consider issues raised by parties who did not file cross-appeals where the issue, if sustained, would modify the judgment adversely against the petitioner. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). Likewise, this Court has consistently held that a notice of appeal is a jurisdictional requirement for appellate review and that failure to file a notice of appeal renders a trial court's judgment final against the non-appealing party. *See, e.g., Torres*, 487 U.S. at 315-18.

Yet, the courts of appeals remain divided on the issue of whether one party's appeal may confer jurisdiction sufficient to permit other parties to attack the judgment below or to benefit from an appellate reversal upon remand. Some cases hold that a cross-appeal or separate appeal is a jurisdictional prerequisite to any party's attack on the trial court's judgment. *EF Operating*

Corp. v. American Bldgs., 993 F.2d 1046, 1049 & n.1 (3d Cir.), *cert. denied*, 510 U.S. 868 (1993); *Francis v. Clark Equip. Co.*, 993 F.2d 545, 552-53 (6th Cir. 1993); *New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1206 (3d Cir. 1991); *Rollins v. Metropolitan Life Ins. Co.*, 912 F.2d 911, 917 (7th Cir. 1990); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415-17 (7th Cir. 1989); *Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R./M.P.S. Assocs.*, 806 F.2d 14, 15-16 (2d Cir. 1986); *Benson v. Armontrout*, 767 F.2d 454, 455 (8th Cir. 1985); *Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887, 888-89 (10th Cir. 1984); *S.E.C. v. Youmans*, 729 F.2d 413, 415 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984); *Martin v. Hamil*, 608 F.2d 725, 730-31 (7th Cir. 1979); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 725-26 (2d Cir. 1978); *Gomez v. Wilson*, 477 F.2d 411, 414 n.10 (D.C. Cir. 1973).

Conversely, other circuit court cases hold that a separate or cross-appeal is not jurisdictional, but a mere "rule of practice" which may occasionally be bypassed. *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342-45 (3d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32-33 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990); *LaFaut v. Smith*, 834 F.2d 389, 394 n.9 (4th Cir. 1987); *Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (D.C. Cir. 1986); *Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495, 497-98 (5th Cir. 1982); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341-42 (9th Cir. 1981); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (8th Cir. 1977).

Torres v. Oakland Scavenger Company, 487 U.S. 312 (1988) should have been the deathknell of the "rule of practice" approach. In *Torres*, this Court held that rules 3 and 4 of the Federal Rules of Appellate Procedure combine to create a "single jurisdictional threshold" to appellate review. *Torres*, 487 U.S. at 315; *see supra* Section IA. In light of *Torres*, some circuits have disavowed the rule of practice theory. *See, e.g., Young Radiator*

Co., 881 F.2d at 1415-17 (holding rules 3 and 4 must be satisfied by each party). Yet, some circuits continue to apply the rule of practice theory. *E.g., Tabor Court Realty Corp.*, 943 F.2d at 342-45; *Spann*, 899 F.2d at 32-33; *Freeman*, 790 F.2d at 151. In fact, some circuits have published conflicting opinions within the circuit on the issue. *Compare EF Operating Corp.*, 993 F.2d at 1049 & n.1 *with Tabor Court Realty Corp.*, 943 F.2d at 342-45.

Until recently, post-*Torres* dicta suggested that the Fifth Circuit believed the rule of practice theory was no longer good law. *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1289 (5th Cir. 1992) (noting in dicta that *Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495, 497-98 (5th Cir. 1982), which held that an appellate court has discretion to retain jurisdiction over non-appealing parties, might not be viable in light of *Torres*); *accord, Stockstill v. Petty Ray Geophysical*, 888 F.2d 1493, 1497 (5th Cir. 1989).

In *Marts v. Hines,* 1997 U.S. App. LEXIS 17944 (5th Cir. July 18, 1997), the Fifth Circuit, sitting *en banc,* modified a district court's dismissal without prejudice to a dismissal with prejudice, although Marts, a *pro se* plaintiff, was the sole appellant. *Marts v. Hines,* 1997 U.S. App. LEXIS 17944, at *2, *5-*7 (5th Cir. July 18, 1997). Eight justices dissented on the ground the court's action violates *Morley, Torres,* and rules 3, 4, and 26(b). *Id.,* at *6-*52 (Garwood, J., King, J., Higginbotham, J., Smith, J., Duhè, J., Garza, J., Benavides, J., and Dennis, J., dissenting). The *Marts* dissent highlights a sixty-year struggle among the circuits over the issue presented in Grand Lockwood's petition. The Court should grant certiorari to resolve the issue.

C. The rule of practice theory is erroneous.

The rule of practice theory simply cannot be reconciled with the appellate rules and this Court's precedents. For example, some courts attempt to justify the rule of practice theory by arguing the initial notice of appeal invokes jurisdiction over the "whole case." *Tabor Court Realty Corp.,* 943 F.2d at 344;

LaFaut, 834 F.2d at 394 n.9; *Freeman,* 790 F.2d at 151; *Hysell,* 559 F.2d at 476. This rationale renders rule 4 meaningless. If an initial appeal invokes jurisdiction over the entire case, parties would not need the additional fourteen days rule 4 provides for filing additional notices of appeal. Furthermore, *Torres* inherently rejected the "whole case" rationale. As the Seventh Circuit noted:

> [I]t could have been argued in *Torres* that the notice of appeal naming fifteen of the sixteen plaintiffs invoked the jurisdiction of the court over the whole case, so that a separate appeal by the sixteenth plaintiff would not be jurisdictionally required. Yet the Court's holding made clear that the requirements of Rules 3 and 4 must be satisfied as to each party, and precludes the argument in this case that Celotex's noncompliance with Rule 4(a)(3) can be waived.

Young Radiator Co., 881 F.2d at 1416. Thus, the "whole case" rationale has been intrinsically overruled by this Court.

Some courts also trace support for the rule of practice theory to *Lagnes v. Green,* 282 U.S. 531 (1931). *E.g., Tabor Court Realty Corp.,* 943 F.2d at 342. Their reliance, however, is flawed. The rule of practice language in *Lagnes* is mere dicta because the respondent in that case attempted to sustain, rather than to attack, the lower court's decree. *Lagnes,* 282 U.S. at 538 (citing *United States v. American Ry. Express Co.,* 265 U.S. 425, 435 (1924)). In addition, *Lagnes* predates *Morley,* and therefore, to the extent the two conflict, *Morley* is controlling.

The rule of practice theory is wrong. Because of it, litigants like Grand Lockwood remain plagued by inconsistent application of the theory, even within particular circuits. The Court should grant certiorari to resolve these conflicts and to restore equity to appellate procedure.

II. This case presents an opportunity to resolve the jurisdictional notice of appeal requirement as applied both to parties who neither appealed nor appeared before an appellate court and to parties who appeared as appellees without filing a separate or cross-appeal.

Certain parties in this case argue that every successful party in the trial court is entitled to benefit from Kraft's appeal by receiving additional redistributed funds upon remand. (See Vista Chemical Company's Reply to Grand Lockwood Partners Limited Partnership's Petition for Panel Rehearing and Motion for Clarification of Opinion.) The non-appealing parties in this case may be divided into two categories. Most parties are within the first category—those who accepted the trial court's judgment and did not file a notice of appeal or appear as appellees before the Fifth Circuit. The second category includes only Vista, who appeared as an appellee but failed to file a notice of appeal.

Granting certiorari on the sole issue of whether a party must satisfy the requirements of rules 3, 4, and 26(b) before receiving appellate benefits enables the Court to dispel all conflicting authority regarding both categories of parties. *See, e.g., Tabor Court Realty Corp.*, 943 F.2d at 342-45 (opining that the "lack of a formal cross-appeal will not always determine a court's ability to consider certain issues that are raised by parties to the appeal but also pertain to parties who are not formally participating in the appeal").

Grand Lockwood submits that neither category is entitled to benefit from a reversal of the judgment for Grand Lockwood because neither category crossed the appellate jurisdictional threshold. FED. R. APP. P. 3, 4, 26(b); *Torres,* 487 U.S. at 315-18. Vista, who merely appeared as an appellee before the Fifth Circuit, has no more right to appellate benefits upon remand than the parties who neither appealed nor appeared as appellees. *Morley,* 300 U.S. at 187-91; *Torres,* 487 U.S. at 315-18.

III. Resolving this issue protects the finality of judgments.

Left unresolved, the practice of permitting non-appealing parties to attack the judgment and to benefit from an appeal damages both litigants and well-settled judicial policies. Appellants are left to bear all appellate costs, only to bestow unearned benefits to non-appealing parties. Conversely, parties who are successful in trial cannot rely on notices of appeal to determine the finality of the judgment as to non-appealing parties. The notice of appeal exists, in part, to give such successful litigants fair notice of the parties appealing the judgment. *Torres,* 487 U.S. at 318. When courts exercise jurisdiction over non-appealing parties "the appellee and the court [are] unable to determine with certitude whether a losing party not named ... should be bound by an adverse judgment." *Id.* Thus, policies favoring the finality of judgments are thwarted when litigants cannot rely upon notices of appeal as indications of the extent to which a judgment is final.

Finality and repose are essential to our judicial system. *Cardinal Chem. Co. v. Morton Int'l, Inc.,* 508 U.S. 83, 100 (1993); *see also Lawrence ex rel. Lawrence v. Chater,* 116 S. Ct. 604, 610 (1996). Finality not only protects successful parties from oppressive litigation, but also preserves scarce judicial resources. *See Montana v. United States,* 440 U.S. 147, 153 (1979). Consequently, parties should be required to litigate effectively in their first opportunity in court, rather than be permitted to delay another's access to the courts.

Yet, in this case, parties who chose not to invoke the appellate court's jurisdiction, and thereby conceded the district court's judgment, now seek appellate benefits upon remand. Unless the Court corrects this error, Grand Lockwood is denied the finality of judgment guaranteed by the rules of procedure. Without having the notice and an opportunity to respond, provided by notices of appeal, Grand Lockwood is forced to relitigate issues already decided.

No maxims are more firmly established than those preventing repeated litigation: *"interest rei publicoe, ut sit finis litium,* and *nemo debet bis vexari pro una et eadam causa,"* meaning it concerns the public that litigation be ended, and no one should be vexed twice for the same cause. *United States v. Throckmorton,* 98 U.S. 61, 65 (1878). By clarifying that a party may not benefit from an appellate reversal without filing a timely notice of appeal, this Court may provide litigants with access to the finality of judgments guaranteed by the rules of procedure.

To protect the finality of judgments and restore certainty to appellate procedure, this Court should grant certiorari. To reinstate the purpose, meaning and equitable intent of the Federal Rules of Appellate Procedure, this Court should rule that each party seeking to attack the trial court's judgment or to benefit from an appellate reversal must first invoke the jurisdiction of the appellate court by filing a timely notice of appeal.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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